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Limits of Political Freedom in Democratic Constitutional States – A Comparative Study on Germany, France and the USA

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Abstract

Art, Ausmaß und Bedingungen der Begrenzung politischer Grundrechte spiegeln das Freiheitsverständnis demokratischer Verfassungsstaaten. Trotz aller Gemeinsamkeiten in den „fundamentals“ finden in rechtlichen Freiheitsbegrenzungen und der jeweiligen Freiheitsbegrenzungspraxis spezifische historische Erfahrungen ihren Niederschlag, die eine unterschiedliche Wertschätzung von Freiheiten und divergierende Bedrohungsperzeptionen erklären. Der Beitrag vergleicht anhand von Beispielen die Demokratieschutzkonzepte und -praktiken in Deutschland, Frankreich und den USA mit Blick auf die spezifische Art der Begrenzung von Meinungs- und Vereinigungsfreiheit. Nach einem historischen Abriss zur Entstehung und rechtlichen Ausformung der Demokratieschutzkonzepte folgt ein Blick auf die jeweilige Praxis seit 1945. Abschließend wird versucht, aus dem Vergleich der Demokratieschutzkonzepte und -praktiken Rückschlüsse auf das ihnen zugrunde liegende Freiheitsverständnis zu ziehen.

I. Introduction

The character, extent and condition of the limitation of political fundamental rights reflect the understanding of freedom, which modern constitutional states represent. Despite the many similarities concerning fundamental ideas, specific historical experiences manifest themselves in the legal limitations of freedom and their practice. These historical experiences may explain the different attitudes towards certain liberties as well as the various expectations of security and perceptions of threats.

The following contribution offers a comparison of the concept and protection of democracy in Germany, France and the USA. In the literature the terms “protection of democracy”, “protection of the constitution” and “protection of the re-

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public" have similar meanings, which are understood as a form of state protection that encompasses basic values, codes of practice and institutions of the democratic constitutional state.[1] The concept consequently excludes the idea of the states as independent, autocratic-Machiavellian organs that ensure the status quo. It includes the institutional aspects (e. g. the control of power) as well as procedural (e. g. pluralism) and political-cultural (e. g. the valuation of autonomous civil engagement) aspects. As such it does not solely mean a promotion of the "Civil Society".

This contribution is essentially limited to one aspect of the protection of democracy: the dealing with political forces, which tend (whether real or imaginary) implicitly or explicitly to undermine the fundamental values, codes of practice and institutions of the democratic constitutional state and aspire towards an authoritarian or completely totalitarian transformation. Particular attention is paid to the specific type of limitation to freedom of speech and freedom of association, i. e. the freedom to be political active, which belong to areas protected by the constitution. The constitution is subject to particular legal and institutional protection mechanisms. The restriction of these protected rights requires a particular legitimisation and is generally connected to strict legal-procedural regulations. In a certain way these reflect the understanding of freedom in democratic constitutional states.

After an historical sketch of the establishment and legal formulation of the concept of democracy protection, we will take a look at the various practices of democracy protection since 1945. Finally I shall attempt to draw conclusions from the comparison of the concepts of democracy protection and actual practice on the underlying understanding of freedom. The principles of freedom and security determine and limit each other in their own particular way.

1 Cf., on terminology, among others: Uwe Backes, Schutz des Staates. Von der Autokratie zur streitbaren Demokratie, Opladen 1998, p. 2 f.; Roman Herzog, Der Auftrag der Verfassungsschutzbehörden. In: Bundesministerium des Innern, Verfassungsschutz und Rechtsstaat. Beiträge aus Wissenschaft und Praxis, Cologne 1981, p. 1–18; Ulrich Scheuner, Der Verfassungsschutz im Bonner Grundgesetz. In: Um Recht und Gerechtigkeit. Festgabe für Erich Kaufmann zu seinem 70. Geburtstag, Stuttgart 1950, p. 313–330. The three terms "Demokratieschutz" (protection of democracy), "Verfassungsschutz" (protection of the constitution) and "Republikschutz" (protection of the republic) can be clearly distinguished from each other through a pure consideration of the history of ideas, however such terminology is unavoidably misunderstood because the use of it in academia, publishing, politics and daily language does not make a clear distinction.

II. The historical background of the evolution of the concepts of state and democracy protection

The beginning of the modern democratic constitutional states extends further back in the USA and France than in Germany. Therefore, both countries also enjoy an older tradition of democracy protection, which oxymoronically ensures and limits freedom. In both states the beginnings of democracy protection were overshadowed by grave constitutional measures, not withstanding direct violation of the civil rights of those classed as "anti-republican" and "subversive". The new political-institutional formation principles and their normative fundamentals had to be implemented, consolidated and protected against the (real or imaginary) followers of the old regime, or rather radical alternatives of the system.

During the French Revolution intentions disruptive to freedom caused mutual declarations of animosity. The agricultural Communist, François Noël Babœuf, who was later executed on the charge of conspiracy, branded the assaults on the public civil rights as "Projets Liberticides".[2] The protection of the Republic in the eyes of the Jacobin Club even justified "terrorist" methods.[3] Antoine de Saint-Just was ascribed the paroles "Pas de liberté pour les ennemis de la liberté!"(No freedom for the enemies of freedom!). The referred to "ennemis de la liberté" were anyone, who criticised the Jacobin regime of virtue terror. For many "Pas de liberté" meant the guillotine.

During the US election campaign in 1798, against the background of the French-British war, important Republicans, even including Thomas Jefferson, were depicted as France's fifth column, potential atheists and Jacobins, thus traitors of the USA. Congress passed many laws, known as the *Alien and Sedition Acts*, in which defence measures were provided. In turn it came to prosecutions, in which followers of the Republican Party were declared guilty.[4]

From 1798 until present day the discussion of the punishment of "seditions" and "subversive activities" is constantly trying to draw the fine line between freedom and security, in particular the extent of the limitation to civil rights, which

2 Quoted from Michèle Lenoble-Pinson, Liberticide. Néologisme révolutionnaire. In: Hugues Dumont/Patrick Mandoux/Alain Strowel/François Tulkens (ed.), Pas de liberté pour les ennemis de la liberté? Groupements liberticides et droit, Brussels 2000, p. 19–25, here 20. Also see Max Frey, Les transformations du vocabulaire français à l'époque de la Révolution (1789–1800), Paris 1925, p. 30.

3 Cf. Gerd van den Heuvel, Terreur, Terroriste, Terrorisme. In: Rolf Reichardt/Eberhard Schmitt (ed.): Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680–1820, No 3, Munich 1985, p. 89–132.

4 Cf. John Miller, Crisis in Freedom. The Alien and Sedition Acts, Boston 1951; Helmut Steinberger, Konzeption und Grenzen freiheitlicher Demokratie. Dargestellt am Beispiel des Verfassungsrechtsdenkens in den Vereinigten Staaten von Amerika und des amerikanischen Antisubversionsrechts, Berlin (West) 1974, p. 272–282; Geoffrey R. Stone, Perilous Times. Free Speech in Wartime. From the Sedition Act of 1798 to the War on Terrorism, New York 2004, p. 15–78.

one is ready to accept in the interest of public safety. The founding fathers of the United States were convinced of a liberal tradition of freedom that dates back to Antiquity and holds that individual freedoms could not last long without institutional protection. They predominantly had nonetheless a procedural understanding of democracy and placed all constitutional decisions at the disposition of a qualified legislative majority.[5] The right to freedom of speech was emphasised in the *First Amendment*, however, it did not anchor freedom of association in the constitution. Freedom of association, which was only granted the status of a constitutional right by the Supreme Court much later, is still derived from the right of individual freedom of speech.[6]

The legal practice of the liberal majority in the Supreme Court draws attention to the limitation of the features of criminal actions, which are classed as "sedition". This primarily concerns the act of "overthrowing the government by force and violence". It was controversial, whether pure ambitions must be actually present, if violence is propagated, or whether a reference to action should be necessary. The US American practice of protecting democracy swayed between the incrimination of simple "expressions" and the strict limitation of violence orientated "actions". The widest reaching approach to bringing forward the protection of democracy in the area of repression of non-violent intentions to overthrow are found in the *Internal Security Act* (1950) and the *Communist Control Act* (1954), which were enacted in the McCarthy era. However, even they did not envisage a prohibition of organisations, but rather further developed the exposure and registration system, which had already been implemented by the *Voorhis Act* (1940) and the *Smith Act* (1940), but nevertheless promoted a climate of intimidation and denunciation.[7]

In contrast to the USA, which gradually democratised throughout the nineteenth century, the constitutional development in France until the eighteen-seventies was influenced by the acute antagonism between the monarchists and the republicans. Abrupt changes of course between both poles caused waves of repression against the respective adversaries. The foundation of democracy protection, which is still valid today, was laid down in the Third Republic. The association law, which is included in the *Grandes lois de la République* from 1st July 1901, draws limits of the freedom of associations in cases, in which associations act against the law, "good manners", the "integrity of the national territory" or

5 According to the prevalent academic opinion Art. 4 para. 4 of the US Constitution ("The United States shall guarantee to every State in this Union a Republican form of government") does not hinder the law makers from perverting the "republican form", which incidentally is not more clearly defined. Cf. on this question Gregory H. Fox/ Georg Nolte, Intolerant Democracies. In: Harvard International Law Journal, 36 (1995) 1, p. 1–70, here 25.

6 Cf. David Fellman, The Constitutional Right of Association, Chicago 1963.

7 Cf. Gregor Paul Boventer, Grenzen politischer Freiheit im demokratischen Staat. Das Konzept der streitbaren Demokratie in einem internationalen Vergleich, Berlin (West) 1985, p. 95–139; Steinberger, Konzeptionen und Grenzen freiheitlicher Demokratie, p. 343–460.

the "republican form of government".[8] On the request of the public prosecutor or of a member the *Tribunale de grande instance* (regional court) may declare an association void. A further instrument to protect democracy was created in the mid nineteen-thirties as a result of the escalation in violence with far right motivations.[9] The legislation of 10th January 1936 on combat groups or private militia ("loi sur les groupes de combat et les milices privées") gave the president of the Republic the authority to disband associations and groups, in particularly if these "are noticeable due to the military form and organisation as combat groups or private militia".[10] A decision to ban a group may be contested before the Conseil d'Etat, which is an actively used instrument.

Germany's development as a constitution state in the nineteenth century differs hugely from both France and the USA. The constitutionalisation essentially began after the Napoleonic Wars and occurred differently in the majority of the 40 states, which at the time existed on German territory. The most important and earliest beginnings of a liberal protection of the constitution are found in the German South West.[11] In contrast the two large powers of Prussia and Austria remained absolutist for a long time. However, this was not the only place, where one resorted to a wide ranging arsenal of repressive instruments in order to ensure "Germany's peace, security and order" as a result of the gain in influence of

8 Loi du 1er juillet 1901 relative au contrat d'association, Titre premier, article 3: "Toute association fondée sur une cause ou en vue d'un objet illicite, contraire aux lois, aux bonnes moeurs, ou qui aurait pour but de porter atteinte à l'intégrité du territoire national et à la forme républicaine du gouvernement, est nulle et de nul effet." Boventer, Grenzen politischer Freiheit p. 140–181; Isabelle Canu, Der Schutz der Demokratie in Deutschland und Frankreich. Ein Vergleich des Umgangs mit politischem Extremismus vor dem Hintergrund der europäischen Integration, Opladen 1997, p. 99–188; Jean-François Merlet, Une grande loi de la Troisième République: La loi du 1er juillet 1901, Paris 2001.

9 Cf. on the contempary historical background: Serge Berstein, Le 6 février 1934, Paris 1975; Stéphane Kotovtchikhine, L'action juridique face aux groupements d'extrême-droite à la fin de la IIIe République. In: Bruno Villalba/Xavier Vandendriessche (ed.), Le Front National au regard du droit, Villeneuve d'Ascq 2001, p. 19–38; Andreas Wirsching, Vom Weltkrieg zum Bürgerkrieg? Politischer Extremismus in Deutschland und Frankreich 1918–1933/39. Berlin und Paris im Vergleich, Munich 1999, p. 467–506.

10 Michel Fromont, Die Parteiinstitution in Frankreich. In: Dimitris Th. Tsatsos (ed.), 30 Jahre Parteiengesetz in Deutschland. Die Parteiinstitution im internationalen Vergleich. Aspekte aus Wissenschaft und Politik, Baden-Baden 2002, p. 123–132, here 128. Also see: Fromont, Die Institution der politischen Partei in Frankreich. In: Dimitris Th. Tsatsos/Dian Schefold/Hans-Peter Schneider (ed.), Parteienrecht im europäischen Vergleich. Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft. Erträge eines Forschungsprojektes an der Fern-Universität Hagen, Baden-Baden 1990, p. 219 f.

11 One of the first compendiums on the liberal protection of the constitution appeared at the end of the eighteen-twenties: Johann Christoph Freiherr von Aretin/Karl von Rotteck, Staatsrecht der konstitutionellen Monarchie. Ein Handbuch für Geschäftsmänner, studierende Jünglinge und gebildete Bürger, Zweiten Bandes erste Abtheilung, Altenburg 1827, Zweiten Bandes zweite Abtheilung, Altenburg 1828.

a moderate liberal and a radical-democratic opposition.[12] With the establishment of the Reich in 1871 a sustainable process towards a constitutionalisation and democratisation in the small German framework began but was nevertheless accompanied by acute struggles against the emerging Social Democratic movement, which was increasingly Marxist orientated. The "law against the efforts of Social Democrats, which are dangerous to public security" was enacted under Bismarck after a far left attack on Kaiser Wilhelm I. It remained legislature from 1879 to 1890 and lead to the imprisonment of leading Social Democrats.[13]

This experience influenced the marked liberal definition of the protection of democracy in the Weimar Republic. Although committed Republicans were from the outset confronted with the superiority of extreme powers from the left and the right, they stood by their conviction that democracy must open the same possibilities of action to all, including anti-democratic political forces. In so far this former position is similar to the current thinking on democracy protection in the USA. It was an expression of minority opinion as the Reich president's decree of enactment on the protection of the republic on August 1921 (after the attack with far right motivations on the Reich foreign minister, Walter Rathenau) claimed: "the constitution, which realises the democratic support of the freedom of the press, societies and associations, at the same time protects the authority to limit these freedoms if they should be misused to abolish the constitution".[14] However, this opinion did not find "any support in the wording of the constitution of the Weimar Republic",[15] which did not envisage the limitation of the right to political activity of enemies of the republic, who legally operated. The instruments on the limitation of political activity (such as bans on speech, societies and parties), which were created in light of the excessive political violence, and the actions of the constitutional court between 1922–1926/27 for the protection of

12 According to the title quotation in Wolfram Siemann, "*Deutschlands Ruhe, Sicherheit und Ordnung*". Die Anfänge der politischen Polizei 1806–1866, Tübingen 1985. See on the state surveillance activities in the German Vormärz: Hans Adler (ed.), Literarische Geheimberichte. Protokolle der Metternich-Agenten, vol. I: 1840–1843, vol. II: 1844–1848, Cologne 1977/81; Leopold Friedrich Ilse, Geschichte der politischen Untersuchungen, reprint of the edition Frankfurt a. M. 1860, Hildesheim 1975; Frank Thomas Hoefer, Pressepolitik und Polizeistaat Metternichs. Die Überwachung von Presse und politischer Öffentlichkeit in Deutschland und den Nachbarstaaten durch das Mainzer Informationsbüro (1833–1848), Munich 1982.

13 Cf. Wolfgang Pack, Das parlamentarische Ringen um das Sozialistengesetz Bismarcks 1878–1890, Düsseldorf 1961.

14 Quoted from Friedrich Karl Fromme, Die Streitbare Demokratie im Bonner Grundgesetz. Ein Verfassungsbegriff im Wandel, in: Bundesministerium des Innern, Sicherheit in der Demokratie. Die Gefährdung des Rechtsstaats durch Extremismus, Cologne 1982, p. 119–52, here 20 f.

15 Friedrich Karl Fromme, Von der Weimarer Verfassung zum Bonner Grundgesetz. Die verfassungspolitischen Folgerungen des Parlamentarischen Rates aus Weimarer Republik und nationalsozialistischer Diktatur, 3. amended edition Berlin 1999 (1960), p. 178.

the republic were intended to combat politically motivated violence.[16] They additionally relied on the emergency order law of the Reich president (art. 48 constitution of the Weimar Republic) or on the exception law, which allowed breach of the constitution. The emergency law was able to develop into an instrument, which could be used against the republic if it should fall into the hands of persons of dubious loyalty to the constitution, as happened under Hindenburg. And the exceptional law on the protection of the republic, despite its constitutional questionability, required a two-thirds majority in the Reichstag and Reichsrat, which after the elections in September 1930 was no longer thinkable. Thus the suggestion addressed to the Prussian ministry of the interior (1930) from the acting Berlin police president, Berhard Weiß, and Robert W. Kempner, who later became the US prosecutor in Nuremberg, that the NSDAP should be classified as "a highly treasonable connection that was hostile to state and republic", could not be implemented.[17] Leading circles in the government, including Chancellor Brüning, worked towards tactically unions with the National Socialists and prevented the efforts to place them on an equivalent level to the German Communist Party (KPD).[18] Although among the republican law experts ever more voices called for a more offensive confrontation with the National Socialist movement in light of the existing crisis of the system, the principle of the value neutrality of democracy remained untouched.[19]

The constitutional lawyer and political scientist, Karl Loewenstein, went a decisive step further as he declared at the conference of the German constitutional law lectures: "The state has the duty of self-preservation, to defend itself against precisely those parties, who have the parliamentary apparatus at their disposal but have made it their agenda to destroy this apparatus. The usual methods against parliamentary obstruction are insufficient. The parties, which programmatically and actually condemn parliamentarianism, must be disqualified from using it. Possibly not even a change in the constitution would be necessary but a

16 Cf. Christoph Gusy, Weimar – die wehrlose Republik?, Tübingen 1991; Mathias Grünthaler, Parteiverbote in der Weimarer Republik, Frankfurt a. M. 1995; Ingo J. Hueck, Der Staatsgerichtshof zum Schutze der Republik, Tübingen 1996.

17 Cf. Robert W. Kempner (ed.), Der verpasste Nazi-Stopp. Die NSDAP als staats- und republikfeindliche hochverräterische Verbindung. Preußische Denkschrift von 1930, Frankfurt a. M. 1983.

18 Cf. in detail Gotthard Jasper, Die gescheiterte Zähmung. Wege zur Machtergreifung Hitlers 1930–1934, Frankfurt a. M. 1986, p. 63–74.

19 Cf. only Hans Mayer, Verfassungsbruch oder Verfassungsschutz? In: Die Justiz, 7 (1932), p. 545–564, here 563: "Die einzig denkbare Unterscheidungsmöglichkeit ist die Scheidung nach der Legalität oder Illegalität der Mittel einer Parteiorganisation. Nur derjenige also könnte als staatsfeindlich erklärt werden, welcher mit Mitteln seine politischen Ziele verfolgen möchte, die den bestehenden Gesetzen, vor allem den Strafgesetzen, zuwiderlaufen. Das ist auch die ständige Auffassung des Reichsgerichts. Legt man aber diesen Maßstab zugrunde, so dürfte kaum der Nachweis zu erbringen sein, dass die Mittel der NSDAP mit den bestehenden Gesetzen in Einklang zu bringen wären." Also on this topic: Gotthard Jasper, Zur innenpolitischen Lage in Deutschland im Herbst 1929. In: VfZ, 8 (1960), p. 280–289.

change in the rules of procedure would be enough. The state, which is consciously threatened by two radical wing parties, must decidedly strike back".[20] Loewenstein, who in the meantime had immigrated to the USA, advocated a "militant democracy"[21] in the nineteen-thirties. With that he engaged in a debate, which had long raged in America.[22] Such ideas gained influence in the emigrant circles in the following years. So the sociologist Karl Mannheim pleaded in his book "Diagnosis of our Time", which appeared during the Second World War, for a "militant democracy" that would actively confine the political room for manoeuvre of anti-democratic powers in the forefront of violent projects to topple the government.[23] Exiled German Social Democrats (SPD) in their post war-visions of Germany also discussed the possibility of establishing a "militant" or "battling" democracy.[24] During the constitutional consultation both at the national and Länder level returned emigrants, such as the Bavarian SPD politician Wilhelm Hoegner, were significantly involved in the legal constitutional embodiment of a "militant democracy".[25]

20 "Aussprache am zweiten Tage. Wahlrechtsreform". In: Verhandlungen der Vereinigung der Deutschen Staatsrechtslehrer 1932, no. 7, p. 193.

21 Karl Loewenstein, Militant Democracy and Fundamental Rights. In: American Political Science Review, 31 (1937), p. 417–433 and 638–658; also see Karl Loewenstein, Verfassungslehre, 2. edition Tübingen 1969, p. 349, in which he distances himself from his earlier propounded concept without informing of his change of opinion.

22 Cf. Boventer, Grenzen politischer Freiheit, p. 59–82.

23 Karl Mannheim, Diagnose unserer Zeit. Gedanken eines Soziologen (1941), Zurich et al. 1951.

24 This was the case of Curt Geyer and Friedrich Stampfer (1939/40): Rainer Behring, Demokratische Außenpolitik für Deutschland. Die außenpolitischen Vorstellungen der Sozialdemokraten im Exil 1933–1945, Düsseldorf 1999, p. 361 f. In a speach to the German working class (November 1941) Hans Vogel pleaded for a "kämpferische Demokratie"(militant democracy): "Demokratische Rechte ja, aber nicht für die Feinde der Demokratie, die nur das Ziel verfolgen, mit den Mitteln der Demokratie die Demokratie zu vernichten." (Yes to democratic rights, but not for the enemies of democracy, who only follow the goal of destroying democracy with the means of democracy.) Quoted from Johannes Klotz, Das "kommende Deutschland". Vorstellungen und Konzeptionen des sozialdemokratischen Parteivorstandes im Exil 1933–1945 zu Staat und Wirtschaft, Cologne 1983, p. 167. The post-war plans of the "Union deutscher sozialistischer Organisationen in Groß-Britannien", which was established in 1941, excluded those persons and organizations from the privilege of freedom of speech and freedom of association, who in their turn favoured "the coalition and promotion of a state order that cannot be maintained without the permanent nullification of the freedom of association and the freedom of speech". Quoted according to Friedrich Stampfer, Die dritte Emigration. Ein Beitrag zu ihrer Geschichte. In: Erich Matthias/Werner Link (ed.), Mit dem Gesicht nach Deutschland. Eine Dokumentation über die sozialdemokratische Emigration, aus dem Nachlass von Friedrich Stampfer, Düsseldorf 1968, p. 61–169, here 136.

25 Cf. Wilhelm Hoegner, Der schwierige Außenseiter. Erinnerungen eines Abgeordneten, Emigranten und Ministerpräsidenten, Munich 1959, p. 250. Hoegner mentioned a conference of lawyers on this subject in Paris, in which he participated in 1937. Contributions to the conference can be found in the following volume: Association Juridique Internationale, Régression des principes de liberté dans les réformes constitutionnelles de certains états démocratiques, Paris 1938.

The founding fathers of the second German democracy suffered from a trauma, which was caused by the failure of the Weimar Republic. Before their eyes the National Socialists succeeded in using the rules of a liberal democracy to pursue totalitarian goals by using the tactic of legality. They came to power and consolidated it using methods that to a large extent were legal. During the consultations of the Länder constitutions and in particular in the Parliamentary Council (*Parlamentarischer Rat*) the great worry was still present in light of the scenes in the Soviet Occupation Zone. After the unification of the SPD and the KPD in April 1946, which occurred thanks to the use of considerable force, the remaining democratic parties in the SOZ were put under pressure, their sphere of activities was shrunk and the SED began to engineer a ruling monopoly. Thus, there was a wide consensus that a stop should be put to the legality tactic of far right and far left movements.[26] The deputy, Carlo Schmid (SPD), declared on the 8th September 1948 in the plenum of the Parliamentary Council that in the future "those, who want to use fundamental rights in order to fight against democracy and the peaceful fundamental order, may not call upon them."[27]

The solution, as it was eventually included in the constitution as concept of democracy protection, consisted of the anchoring of an unchangeable valid core of democratic values and rules in the constitution ("liberal democratic fundamental order"; art. 1, 20, 79, para. 3 Basic Law: BL). The procedural understanding of democracy, which was predominant in the Weimar Republic, was purposely broken with. Instead the natural right concepts of Western democratic tradition were called upon. On the other hand a series of defence instruments for the constitution, in particularly the ban on political associations (art. 9 para.2 BL), the prohibition of parties (art. 21, para. 2 BL) and the possibility of the forfeiture of fundamental rights (art. 18 BL) were introduced. Such instruments were partially foreign to the Western democratic tradition.[28] They authorised the

26 The predominant anti-fascist orientation during the consultations for the Länder constitutions developed at the latest in the Parliamentary Council to an anti-extremist position. Only the KPD deputies largely distanced themselves from this consensus. Cf. Armin Scherb, Präventiver Demokratieschutz als Problem der Verfassungsgebung nach 1945, Frankfurt a. M. 1987, p. 274–276. See on the anchoring of the concept of "streitbaren Demokratie" (militant democracy) in the German constitution: Fromme, Von der Weimarer Reichsverfassung; Peter H. Merkl, Die Entstehung der Bundesrepublik Deutschland, Stuttgart 1965; Karlheinz Niclauß, Demokratiegründung in Westdeutschland. Die Entstehung der Bundesrepublik von 1945–1949, Munich 1974; Frank R. Pfetsch, Verfassungspolitik der Nachkriegszeit. Theorie und Praxis des bundesdeutschen Konstitutionalismus, Darmstadt 1985.

27 Parlamentarischer Rat, Stenographische Berichte über die Plenarsitzungen, Bonn 1948/49, p. 14.

28 These among others may be counted as further instruments for the protection of the constitution: the attachment of the freedom to teach loyalty to the constitution (art. 5, para 3 BL), the limitation of letter, post and telecommunication privacy (art. 10, para 2 BL), the limitation of freedom of movement in the case of acute danger to the democratic order (art. 11, para 2 BL), the duty of loyalty for the relatives of employees in the

limitation on the right of political participation, in as far as this was misused in the struggle against the democratic constitutional state. The use of violent methods is in no way a pre-requisite. A hostile ethos, the aggressive position of an extremist movement or its representatives against fundamental elements of the peaceful democratic fundamental order suffices.

The German concept of "militant democracy" with the instrument of party prohibition has influenced the constitutional law of many of the new European democracies (e. g. Spain, Portugal, Poland, the Czech Republic and Slovakia).[29] However, it has hardly affected the old democracies in France and the USA. Nevertheless, the possibility to disband a party according to the German example played a role in the consultations on the constitution of the Fifth Republic of France. General de Gaulle would have liked to use this instrument against the Communist party, but he did not wish to add fuel to the claims that he intended to establish a dictatorship. He himself feared the possible misuse of the instrument, should it fell into the wrong hands.[30] Although the stipulations of article 4

civil service (art. 33, para 4 BL) and the establishment of authorities for the collection of information on extremist activities (art. 87,1). Cf. Uwe Backes/Eckhard Jesse, Politischer Extremismus in der Bundesrepublik Deutschland, most recent edition, Bonn 1996, p. 466– 469; Jürgen Becker, Die wehrhafte Demokratie des Grundgesetzes. In: Josef Isensee/Paul Kirchhof (ed.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. VII: Normativität und Schutz der Verfassung – Internationale Beziehungen, Heidelberg 1992, p. 309–359; Hans Hugo Klein, Verfassungstreue und Schutz der Verfassung. In: Verhandlungen der Vereinigung der Deutschen Staatsrechtslehrer 1979, vol. 37, p. 53–110; Andreas Sattler, Die rechtliche Bedeutung der Entscheidung für die streitbare Demokratie, Baden-Baden 1982, esp. p. 44–49; Klaus Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol. I: Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung, 2. completely reworked edition Munich 1984, p. 176–230.

29 Cf. European Commission for Democracy through Law (Venice Commission), Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, adopted by the Venice Commission at its 41st plenary session (Venice, 10–11 December 1999), Strasbourg 2000, Chapt. III. B; Jérôme Jamin, Faut-il interdire les partis d'extrême droite? Démocratie, droit et extrême droite, Brussels 2005; Miguel Revenga Sánchez, The move towards a (and the struggle for) militant democracy in Spain, ECPR Conference Paper, Marburg, 18–21 September 2003. See on the Belgian discussion: Marc Uyttendaele/Nathalie Van Laer, Une interdiction constitutionnelle des partis liberticides. In: Revue belge de droit constitutionnel, (1999) 1, p. 65–75; Jan Velaers, Quelques réflexions sur la "démocratie combative" en droit public belge. In: Dumont/Mandoux/Strowel/Tulkens (ed.), Pas de liberté pour les ennemis de la liberté?, p. 319–330.

30 Cf. Pierre Avril, L'article 4: explication d'un paradoxe. In: Didier Maus/Louis Favoreu/Jean-Luc Parodi (ed.), L'écriture de la constitution de 1958. Actes du colloque du XXXe anniversaire, Aix-en-Provence, 8–10 September 1988, Paris 1992, p. 713–719; Michel Fromont, Le statut des partis politiques en France et en Allemagne. In: Peter Häberle/Martin Morlok/Vassilios Skouris (ed.), Festschrift für Dimitris Th. Tsatsos zum 70. Geburtstag am 5. Mai 2003, Baden-Baden 2003, p. 151–163, here 152 f.; Fromont, Grundgesetz und deutsche Verfassungsrechtsprechung im Spiegel ausländischer Verfassungsentwicklung. Landesbericht Frankreich. In: Christian Starck (ed.), Grundgesetz und deutsche Verfassungsrechtsprechung im Spiegel ausländischer Ver-

of the constitution from 1958 bind the parties to the principles of national sovereignty and democracy ("Ils doivent respecter les principes de la souveraineté nationale et de la démocratie"), this routine statement does not yield any consequences in the form of a constitutionally anchored defence mechanism. In particularly "the right to establish an association excludes all prohibitions of a political party, whose program is anti-democratically formed."[31] The legislation does not enact the constitutional principle of loyalty to the constitution, but leaves applicable laws untouched because of the vagueness of the concept of party and essentially party-like associations, which originates from the Third Republic.

III. The practice of democracy protection since 1945

In Germany as in France the prohibition of associations in the decades after the Second World War was no rarity. In the period between 1945 and 2005 more than seventy associations in France were disbanded. During the nineteen-fifties the bans primarily concerned groups supporting the opposition in the Indochina and Algerian wars. During the Fifth Republic the prohibition was used against militant far right and far left formations as well as Basque, Corsican, Breton and separatist groups in the Overseas Territories, who used violence.[32] This is also true of the far right group *Unité radicale,* which was banned in 2002. Their (sporadic) member, Maxime Brunerie, carried out an unsuccessful assassination attempt on President Jacques Chirac on 14th July 2002.[33] All the bans were implemented on the basis of the law from 10th January 1936 and exposed the militant character of the groups ("usage de la force").[34]

In contrast only a small fraction of the associations, which have been banned in Germany since 1949, have committed acts of violence. Their "aggressive stance" towards the fundamental principles of the peaceful democratic fundamental order was the crucial element in their prohibition. Until the 1964 enactment of the law of associations 64 far left and far right organisations were affected. Between 1964 and 2005 the German interior ministry banned 26 associations. In ten cases it concerned far right organisations, particularly with National Socialist tendencies, and there were fifteen cases of extremist associa-

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fassungsentwicklung. Landesberichte und Generalberichte der Tagung für Rechtsvergleichung 1989 in Würzburg, Baden-Baden 1990, S. 101–117.

31 Fromont, Parteiinstitution, p. 126.

32 Cf. Canu, Der Schutz der Demokratie, p. 147–151.

33 Cf. Jean-Yves Camus, Unité radicale continue malgré la dissolution. In: LICRA/Tribune Libre on 11 September 2002.

34 Cf. on the reasons for the prohibition: Pierre Esplugas, L'interdiction des partis politiques. In: Revue française de droit constitutionnel, 36 (1999), p. 675–709, here 696–700.

tion of foreigners, such as the case of the "Kalifatsstaat" (state of the caliphate) in December 2001, whose radical Islamist leader called for the murder of a "counter-caliph". Many further prohibitions, above all against neo-nazi groups, have been implemented by the interior ministries of the Länder.[35]

In the USA the instrument of prohibition of association does not exist. However, many individuals have been prosecuted on the grounds of advocating the "overthrowing or destroying the government of the United States [...] by force or violence" according to the *Smith Act*, which was initiated in 1940 and has been revised many times since then.[36] The *Internal Security Act* from 1950 with its amendment of the *Communist Control Act* of 1954 does not enable the prohibition of organisations, but rather focuses on a system of public exposure and the registration of extremist associations, above all the Communist party along with its sister and cover organisations. All those actions that became known as "McCarthyism" are connected with this practice of democracy protection and were not very effective and created a climate of denunciation, spying and intimidation. For many of those concerned these actions yielded severe personal consequences, even though there were only a few prosecutions on grounds of a punishable political offence. A liberalisation process started in the fifties.

It was due to the judiciary of the *Supreme Court* that the freedom rights, which were formulated in the *First Amendment*, have ever increasingly been extensively interpreted and were particularly limited by the criteria for the use of disruptive violence orientated methods. The violence criteria also determine the surveillance by the FBI. Thus in the USA, in contrast to Germany, there is also no official government extremism but rather a (more narrowly expressed) domestic terrorism report. The German practice of prohibiting parties in comparison to the USA's practice during the nineteen-fifties encroached much less on the civil rights of the concerned individual. But the anti-Communist climate had particular illiberal consequences in as far as members of a forbidden organisation were partially still prosecuted for offences, which were committed before the enactment of prohibition.[37]

The German instrument of party prohibition, which was foreign to the US American practice of democracy protection, was only used in the nineteen-fifties (ban on the far right *Sozialistische Reichspartei* in 1952 and the far left *Kommunistische Partei Deutschlands* 1956). It was not used from the sixties on for the reasons of liberalism.[38] However, under the influence of the xenophobic

35 Cf. Jens Heinrich, Vereinigungsverbot und Vereinigungsfreiheit – Dogmatik und Praxis des Art. 9 Abs. 2 GG. Eine Betrachtung unter besonderer Berücksichtigung der Verbotsverfügungen, Baden-Baden 2005.

36 Cf. 18 U.S.C. § 2385; Steinberger, Konzeptionen und Grenzen freiheitlicher Demokratie, p. 340 f.

37 Cf. Alexander von Brünneck, Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland 1949–1968, Frankfurt a. M. 1968.

38 Cf. Backes, Schutz des Staates, p. 37–54; Eckhard Jesse, Demokratieschutz. In: Backes/Roland Sturm (ed.), Demokratien des 21. Jahrhunderts im Vergleich. Histori-

wave of violence in the first years after German unification a readiness grew to resort to repressive instruments, at least in the struggle against the far right. Thus in 1994 two requests to ban parties were presented against the *Nationale Liste* in Hamburg and the *Freiheitliche Deutsche Arbeiterpartei* (FAP), which was active in many Länder. They were both militant Neo-Nazi organisations. The German constitutional court reached the conclusion that both groups did not fulfil the formal pre-requisites of a political party, which resulted in a disbandment via the prohibition of their associations. Also the prohibition action against the *Nationaldemokratische Partei Deutschlands* (NPD) that started in 2001 was initiated against the backdrop of xenophobic motivated violence. The constitutional court did not come to a conclusion because the majority regarded the presence of so-called "V-men" in the executive committee as an unbridgeable hindrance for a constitutional unobjectionable process. This incident probably discourages a further use of the party prohibition instrument.[39]

A similar incident is in France as good as impossible, although the French constitutional court does not recognise a "parties privilege". The possibility to appeal to the *Court Constitutionnel* for the prohibition of a party does not exist. Although the definition of party in the constitutional law is vague and the majority of parties have the legal status of an association, a prohibition of a party would be possible based on the fundamentals of the law from 10th January 1936. However, this requires the presence of a militant manner in the group because the law is explicitly directed against combat groups and private militias. Bans on associations have in the past also affected organisations, which declared themselves to be "parties" without ever having contested an election (e. g. June 1968, *Parti communiste marxiste-léniniste de France*). The public discussion on the possible ban of the far right *Front national* highlights the limits of prohibiting a party. The argument that the law from 10th January 1936 with the amendment from 1972 (law no. 72–546 of 1. July 1972) already allows the disbandment of an organisation when it propagates racial discrimination[40] (without at the same time solely focusing on the use of violence), overlooks the intention of the law (i. e.

sche Zugänge, Gegenwartsprobleme, Reformperspektiven, Opladen 2003, p. 449–474, here 462 f.; Dan Gordon, Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with that of the United States and West Germany. In: Hastings International and Comparative Law Review, 10 (1987), p. 347–400; Ami Pedahzur, Struggling with the Challenge of Right-Wing Extremism and Terrorism within Democratic Boundaries: A Comparative Analysis. In: Studies in Conflict & Terrorism, 24 (2001), p. 339–359.

39 Cf. Lars Flemming, Das NPD-Verbotsverfahren. Vom "Aufstand der Anständigen" zum "Aufstand der Unfähigen", Baden-Baden 2005. "V-men" ("Vertrauensmänner") are contact persons of the security office for the protection of the constitution. At the same time they are members of the observed party.

40 Cf. Emmanuel Dockès, Le droit et la dissolution des partis d'extrême-droite. In: Villalba/Vandendriessche (ed.), Le Front National, p. 143–152.

battalion groups and private militias) and the difficulty in proving the corpus delicti of the organisation as a whole.[41]

In contrast the anti-discrimination law, which has been anchored in France since the nineteen-seventies, allows an intrusion into the civil active rights of the individual. Thus the chairman of the Front national, Jean-Marie Le Pen, has often been convicted of crimes concerning freedom of speech.[42] Also in the German penal code the punishment of anti-discrimination crimes has in past decades become harsher.[43] Furthermore, in both countries the denial of National Socialist crimes (Loi Gayssot; "Auschwitz-Lüge") is punishable.[44] A German peculiarity is represented in the instrument of forfeiture of fundamental rights (temporary deprivation or limitation of civil active rights), which is embodied in article 18 of the constitution. However, until now it has not had any practical effects because the German constitutional court obstructs its use and in the cases, where it has been requested (among others for Gerhard Frey, who later became the chairman of the far right *Deutsche Volksunion*) the grade of danger to the public has been deemed insufficient. The courts argumentation is reminiscent of the American Supreme Court's test, which makes the violation of the political active rights dependant on the existence of a clear and present danger.[45]

However, such implements are foreign to America's most recent idea of democracy protection because freedom of speech is seen as the freedom that has priority over all other freedoms.[46] In this tradition xenophobic statements, however extreme they might be, enjoy a just as far going civil rights protection as extremist activities do as long as they remain non-violent. The long-standing American discussion of the so-called "hate speeches" shows that the freedom of speech is extensively interpreted and even includes that right to advocate violence as long as the advocacy is not linked with concrete actions. This unique, very far going interpretation of freedom of speech is primarily the result of the

41 Cf. the argumentation in: Esplugas, L'interdiction, p. 696–700 as well as the legal opinion of the Enquête-commission of the Assemblée Nationale: Guy Hermier/Bernard Grasset (ed.), Rapport fait au nom de la Commission d'Enquête (1) sur les agissements, l'organisation, le fonctionnement, les objectifs du groupement de fait dit "Département Protection Sécurité" et les soutiens dont il bénéficierait, Assemblée Nationale, Onzième Législature, Nr. 1622, vol. I, Paris 1999, p. 153–213.

42 Cf. Esplugas, L'interdiction, p. 699.

43 Cf. Karen L. Bird, Racist Speech or Free Speech? A Comparison of the Law in France and the United States. In: Comparative Politics, 32 (2000), p. 399–418; Friedrich Kübler, Rassenhetze und Meinungsfreiheit. Grenzüberschreitende Aspekte eines Grundrechtskonflikts. In: AÖR, 125 (2000), p. 109–130.

44 Cf. Louis Greenspan/Cyril Levitt (ed.), Under the Shadow of Weimar. Democracy, Law, and Racial Incitement in Six Countries, Westport/London 1993; Michel Troper, La loi Gayssot et la Constitution. In: Annales Histoire, Sciences Sociales, (1999), p. 1239–1255; Winfried Brugger, Verbot oder Schutz von Hassrede? Rechtsvergleichende Beobachtungen zum deutschen und amerikanischen Recht. In: AÖR, 128 (2003), p. 372–411, here 396–410.

45 Cf. Schenck v. United States, 249 U.S. 47, March 3, 1919.

46 Cf. Brugger, Verbot oder Schutz von Hassrede?, p. 379 f.

work of the US American *Civil Rights Movements*.[47] Even the denial of the National Socialist crimes is not punishable in the USA. Nevertheless, this has not hindered the USA authorities in occasionally helping their German counterparts with the prosecution of "neo-Nazi" propaganda offences.[48]

IV. The concept of democracy protection and the understanding of freedom in comparison

The concepts and practices of democracy protection with their freedom limiting mechanisms and effects allow important conclusions to be drawn on the prevailing concepts of freedom in the countries compared. In the predominant thinking on democracy protection in the United States of America much of the enthusiasm for freedom from the revolution of the late eighteenth century still remains. Since then the anti-subversion law of the US additionally tends to regard dangers to the democracy primarily as coming from the outside.[49] In 1798 it was the danger of "military despotism under foreign influences", in 1950 the *Internal Security Act* argued against the dangerous "establishment of a totalitarian dictatorship", "vested in and exercised by the Communist dictatorship of a foreign country", in Congress the committee against "un-American activities" met and even the USA PATRIOT Act, which was quickly passed through Congress after the 9/11 attacks, is essentially directed against the infiltration from the outside, i. e. against the protagonists of an internationally active terrorism.[50] In contrast, the trauma of threat and destruction of the democratic constitutional state, which are nourished inside a society, continues to have an effect on European states. This especially applies to Germany, where a deeply inhumane mass movement lead to a moral and material catastrophe, the aftermath of which still occupies German society more than 60 years later. A totalitarian movement succeeded in gaining political power to a large extent through legal means. The fathers of the constitution therefore broke with the procedural understanding of democracy from the Weimar Republic, which was anchored in an untouchable core of values and rules in the constitution that ought to form a uncrossable boundary for the legality of extremist parties.

47 Cf. Samuel Walker, Hate Speech. The History of an American Controversy, Lincoln/London 1994.

48 George Michael, Confronting Right-Wing Extremism and Terrorism in the USA, New York 2003, p. 167–169.

49 Cf. Steinberger, Konzeption und Grenzen freiheitlicher Demokratie, p. 273.

50 Cf. Robert H. Borck, Civil Liberties after 9/11, http://foi.missouri.edu/terrorandcivillib/robertbork.html (4. August 2005); Michael Glennon, Terrorism and the Limits of Law. In: The Wilson Quaterly, 26 (2002) 2, p. 12 ff.; Patrick Horst, Das amerikanische Notstandsrecht nach dem 11. September 2001 – eine "wehrhafte Demokratie" auf Abwegen? In: Uwe Backes/Eckhard Jesse (ed.), Jahrbuch Extremismus & Demokratie, vol. 16, Baden-Baden 2004, p. 59–81.

The trauma of democratic stability in France is not as severe, however, it still exists. It is not a coincidence that the prohibitions of association date from the nineteen-thirties, when the Third Republic was threatened to be torn between the political extremes. However, France has not developed any of the corresponding German "militant democracy" protection systems. Although the French constitution from 1958 (as that of the Third Republic from 1884 and the Fourth Republic) is like the German Basic Law (art. 79, para. 3) "substantive" in the sense that it determines fundamental values ("La forme républicaine du Gouvernement ne peut faire l'objet d'une revision", art. 89, para. 5) and deprives the legislator of the right to change the law. At the same time it is not "militant", i. e. it has no authority to encroach on the political active rights of the individuals and groups. Thus it recognises no systematic "Vorverlagerung" (pushing forward) of the protection of democracy in the area of non-violent activity.

In the case of the USA it is the other way round: The constitution is procedurally conceived and puts therefore all its contents at the disposal of the lawgivers. At the same time it is "militant" because treason against the United States in the sense that supporting enemies of the union is a punishable offence (art. III, section 3).[51] In so far the German constitution appears to be more stringent than the constitutions of France and the USA. Regarding the prohibition of parties the German procedures stand out due to a high degree of constitutional formalisation and safeguarding.[52]

The efficiency of the democracy protection is not primarily dependant on the constitutional consistence of such laws.[53] Especially the German practice of protecting democracy was against the background of a consolidating democracy from the nineteen-sixties on marked by a great restraint in the use of constitutional instruments. The stability trauma of the founding generation was becoming less prominent. In contrast the French practice distinguishes itself through more "militancy" than is contained in the constitutional law. Germany and France are thus closer to each other in the sphere of protection of democracy in actual practice than in theory.

An effective protection of democracy can touch on other factors apart from the restriction of the freedom of extremists. Election procedures (such as barring clauses, majority voting systems or the US American procedure to nominate a candidate) can in certain cases be much more effective in keeping them out of the corridors of power. A vital "civic culture" that is anchored on civic virtues and a general consensus on the fundamental values and rules ought to set narrow boundaries for extremist movements' attempts to gain influence. The experience with the defence efforts of democratic states in the inter war period inci-

51 According to the comparative terminology in: Gregory H. Fox/Georg Nolte, Intolerant Democracies. In: Harvard International Law Journal, 36 (1995), p. 1–70. A similar differentiation is found in: Eckhard Jesse, Demokratieschutz, p. 459 f.

52 Cf. to the French deficits in this regard: Esplugas, L'interdiction, p. 701–709.

53 Cf. Revenga Sánchez, The move towards a (and the struggle for) militant democracy in Spain, p. 4 f.

dentally appears to show that a mixture of anti-extremist militancy and partial "incorporation", i. e. from the strategy of demystification as well as parliamentary and coalition incorporation/taming may be particularly successful.[54]

As the examples of France and the USA show the instrument of prohibiting a party is in no way indispensable for an effective protection of democracy. Rather, there are serious doubts about its effectiveness as the bans may assist a process of radicalisation or produce a martyr effect. In the French debate on the possible uses of a prohibition of the "Front national" a not unknown argument from the German discussion comes to the fore, whose soundness cannot be ignored: A prohibition of a party leads to a metaphorical breaking of the thermometer without sinking the fever.[55] Actually the success of extremist parties is generally an indicator of a situation, which has been neglected by the "established" parties. With a prohibition neither the problems nor the potential of its followers is dealt with.

This is certainly the reason why the instrument of prohibiting parties in the USA largely meets with rejection. The belief in the self healing powers of the "civil society", the trust in the common sense of the common man and the convictions that a "free market place of ideas" is a refuge of reason and liberality are particularly prevalent in the USA. This also explains the tendency to entrust in the implementation of tasks for democracy protection, such as the surveillance of non-violent extremist endeavours, into the hands of actors in the civil society e. g. the *Anti-Defamation League* or the *Militia Watchdog*.[56]

In contrast to the USA the constitutionally anchored protection of democracy in France and Germany place more importance on the security function of institutions. The liberals fear of the "despotism of the majority", which readers of Tocqueville's American book encountered,[57] has in the opinion of the majority of Europeans in many places proved to be justified. However, the concept of the protection of democracy in all three countries is constantly changing. The perception and interpretation of the changing threats is liable to fluctuation and is additionally dependant on the socio-political basis position. A libertarian Left on

54 According to the results of the study by: Giovanni Capoccia, Defending Democracy. Reactions to Extremism in Interwar Europe, Baltimore 2005, esp. p. 203–220. Also see Capoccia, Defending democracy: Reactions to political extremism in inter-war Europe. In: European Journal of Political Research, 39 (2001), p. 431–460; Capoccia, Defence of democracy against the extreme right in inter-war Europe: a past still present? In: Roger Eatwell/Cas Mudde (ed.), Western Democracies and the New Extreme Right Challenge, London 2004, p. 83–107.

55 Cf. Esplugas, L'interdiction, p. 676. On this problematic see among others: Hans-Gerd Jaschke, Die Zukunft der "streitbaren Demokratie". In: TD, 1 (2004), p. 109–123; Horst Meier, Parteiverbote und demokratische Republik, Baden-Baden 1993; Claus Leggewie/Horst Meier, Republikschutz. Maßstäbe für die Verteidigung der Demokratie, Reinbek 1995; Leggewie/Meier (ed.), Verbot der NPD oder Mit Rechtsradikalen leben?, Frankfurt a. M. 2002.

56 Cf. Michael, Confronting Right-Wing Extremism, p. 171–190.

57 Cf. Alexis de Tocqueville, De la démocratie en Amérique, 2 volumes (1835/40), Paris 1981.

both sides of the Atlantic constantly tends to overestimate the meaning of the civil society and to generally sceptically regard the security institutions of the state. For a state-centred Right the opposite is true. The necessity of institutions to ensure security is obvious, if one imagines that the furthest going demands for the encroachment into the individuals' sphere of rights come from the social protagonists, who extensively interpret the paroles "No freedom for the enemies of freedom!" For militant German "anti-fascists" almost anything is allowed in the zealous "struggle against the right."[58] For many "anti-Communists" it is the same but vice-versa.

If one turns away from such extremes: The democracy protection concepts of the large parties are characterised by historical experiences as well as ideological basic acceptances. Anthropological optimism and institutional pessimism frequently also go hand in hand like the opposites anthropological pessimism and institution optimism. A realistic concept of democracy protection must find a middle course between these positions and should be based neither one-sided on means of education nor exclusively on institutional safeguards.

Finally it must not be overlooked that the concepts for the democracy protection of the parties are frequently more influenced by political-tactical calculations than by idealistic divergences. The "right" CSU politician, Günther Beckstein, in the run up to the Bavarian Landtag's elections in 2002 was allowed to call for a prohibition of the NPD because he sought to revoke the "left's" accusation of xenophobia and neglect in the "struggle against the right".[59] On the other hand the "left" socialist, François Mitterrand, organised a TV appearance for the far right populist, Jean-Marie Le Pen, in 1985 in order to stimulate his movement and split the "right".[60] It was no coincidence that George W. Bush's Republican Party, in the run-up to the 2006 congressional elections, placed the threat of international terror at the centre of their campaign, as the majority of US citizens clearly did not rate the ability of the Democrats to provide internal and external security, at least in the earlier ballots.[61] The parties should resist such attempts, as in this way they endanger the credibility of the protection of democracy, wherever the emphasis may lay and thus unwillingly play into the hands of the extremist groups' attempts to win influence.

However, one must realistically take into account that politicians tend to derive their concepts of defence less from basic contemplation on the effectiveness of the concept of the democracy protection than from the requirements of the

58 Cf. Eckhard Jesse, Der deutsche Rechtsextremismus und die Auseinandersetzung mit ihm. In: PVS, 47 (2006), forthcoming; Ralf Grünke, Geheiligte Mittel? Der Umgang von CDU/CSU und SPD mit den Republikanern, Baden-Baden 2006.

59 Cf. on the dynamic of the prohibition debate: Flemming, Das NPD-Verbotsverfahren, p. 98 f.

60 Cf. Emmanuel Faux/Thomas Legrand/Gilles Perez, La main droite de Dieu. Enquête sur François Mitterrand et l'extrême droite, Paris 1994, p. 21.

61 Cf. "Terror verändert das US-Wahlkampfklima. Republikaner und Demokraten suchen politische Vorteile". In: Neue Zürcher Zeitung on 12. August 2006.

rapidly changing state of danger, which is transmitted by the media. Hence the embodiment of the protection of the state and democracy in concrete historical situations allows diverse nuances. As the story of the US anti-subversion law and its implementation shows, the generally permissive practice in the USA in the state of emergence experiences substantial limitations. This was most recently illustrated by the anti-terrorist legislation after 9/11, but this would be a subject for another contribution.